FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 18 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 414

CHARLES A. COLLINS, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

C. T. GRAYDON,
AUGUSTUS T. GRAYDON,
Columbia, S. C.
JOHN K. DeLOACH,
Camden, S. C.,
Attorneys for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	9
Appendix (Opinion Below)	13

TABLE OF CITATIONS

Cases:	Page
Esenwein v. Pennsylvania, 89 L. Ed. 1608	5
Koon v. Koon, 203 S. C. 556, 28 S. E. (2d) 89	8
State v. Hellams, 209 S. C. 141, 30 S. E. (2d) 212	6
State v. Nesmith, 185 S. C. 341, 194 S. E. 160	7
State v. Washnesby (Minn.), 246 N. W. 366	8
Weltzbarger v. State, 89 Ga. App. 765, 81 S. E. (2d) 301	7
Yarborough v. Yarborough, 290 U. S. 202, 78 L. Ed. 172, 54 S. Ct. 181, 90 A. L. R. 924	6

Statutes, etc.:

Georgia Code Ann. Supp., 74-9902	7
United States Code:	
Title 28, Sec. 1257 (3)	2

United States Constitution:

Article III, Section 2	2
Sixth Amendment	2
Fourteenth Amendment	2

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

CHARLES A. COLLINS, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered on June 26, 1959.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina was issued June 26, 1959, and will be reported in Southeastern Reporter Second (West) and South Carolina Reports. It is printed with this Petition as Appendix A.

JURISDICTION

The jurisdiction of this Court is involved under 28 U. S. C., Section 1257 (3), and, in accordance with Rule 23 (1) (f), the question presented in this Petition was raised at the outset of the trial (See Record, p. 3), at the conclusion of the case for the State (See Record, p. 44), at the conclusion of the case (See Record, p. 178), and in the Exceptions (See Record, pps. 187-192, Exceptions 1).

QUESTION PRESENTED

The sole question presented is whether the South Carolina Court of General Sessions (Criminal Division) had jurisdiction of the Defendant on a non-support charge.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner contends that he has been denied his right under Article III, Section 2 of The United States Constitution which guarantees that the trial of a Defendant "shall be held in the State where the said crimes shall have been committed".

The Petitioner likewise contends he was denied the protection of the Sixth Amendment of the United States Constitution which guarantees that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district **wherein the crime shall have been committed**".

Finally the Petitioner contends that he has been denied the protection of the Fourteenth Amendment which prohibits the several States from "depriving any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

But a single question is presented: Was Petitioner tried by a Court without jurisdiction of the crime?

STATEMENT

Petitioner was married to one Marilyn Perry of Kershaw, South Carolina, on September 1, 1957. For about a year they lived in various places while the Petitioner attended school; they actually spent nine months in Buie's Creek, North Carolina, where the Petitioner attended Campbell College.

In September, 1958, this couple moved to Athens, Georgia, where the Petitioner was to attend the University of Georgia. They arrived in Athens on September 17. On September 23 Mrs. Collins left their partially furnished apartment to go to her mother's home in Kershaw, South Carolina. She wrote a note on that date in which she said she would be back when the Petitioner had a place for her (Ex. A, R., p. 193). On the 25th she wrote again saying she would wait to return, "until the trailer comes" (Ex. B. R., p. 194), and on the following date (the 26th) she said: "I'm not leaving you even though your mother thinks I should" (Ex. C. R., p. 195).

An indictment for non-support was returned by the Grand Jury of Kershaw County, South Carolina, in February, 1959, charging the Petitioner with non-support of his wife and a child who was born on November 20, 1958, in Kershaw County, South Carolina. The couple had last lived together as man and wife in Athens, Georgia (R., p. 9).

The child was born in South Carolina almost two months after the wife left the Petitioner who remained in Georgia. The Petitioner said he "tried to talk her into coming back as soon as she left . . ." (R., p. 59). On October 4th the wife and her mother came to Athens and the wife stated that, "she would come back when the trailer came" (R., p. 71). Thereafter the wife and her mother refused to talk to Petitioner, and he found out about the birth of his child through a friend (R., p. 73). Finally the Petitioner

stated: "I exhausted every conceivable effort to get her back" (R., p. 74).

The Petitioner reiterated on the stand during the trial that he wanted his wife and child to return to him (R., p. 75). The Petitioner has continued to maintain his residence in Georgia where he is a student at the University of Georgia. But the wife and child have continued to reside with her mother in Kershaw County, South Carolina.

The Petitioner was indicted on a charge of non-support in a County in which he had never lived and in which the wife lived with her family prior to their marriage. His trial resulted in a verdict of guilty, and the trial Judge assessed the maximum penalties against Petitioner.

Proper objections were made at the outset of the case and at each stage of the proceedings to the jurisdiction of the Court. Those objections were based on the lack of jurisdiction of the South Carolina Court to try a defendant for a crime which began and continued in the State of Georgia.

REASONS FOR GRANTING THE WRIT

The general principles as to the obligation of a father for the support of his wife and his minor child or children are well recognized. The Petitioner in this case has no desire to avoid his conjugal and parental obligations.

But in this instance he has been denied any rights whatsoever in the child which is admittedly his. Can he be required to support his wife and child by a Court which was without jurisdiction in the first place?

It is our view in this Petition (as it has been throughout the South Carolina proceedings) that the Courts of Georgia were (and are) the proper forum to adjudicate the question of non-support against the Petitioner. That was

the State in which the wife left the Petitioner; whether that leaving was justified or not is a Georgia question.

The South Carolina Courts cannot acquire a jurisdiction which that Court never had by legal semantics or judicial legerdemain. Both South Carolina and Georgia say that a husband who is without fault cannot be subjected to criminal prosecution for non-support.

But South Carolina never had jurisdiction in this case, and this lack of jurisdiction presents a constitutional question for decision by this Court.

Why then does petitioner contend South Carolina had no jurisdiction?

It is true that South Carolina claimed jurisdiction, and South Carolina's highest court affirmed that view. But the jurisdiction was not based on a proper application of the law—and any conflict between South Carolina and Georgia in the question is more apparent than real.

That the State in which a **deserted** wife and child are domiciled has a deep concern in the welfare of the family is apparent. *Esenwein v. Pennsylvania*, 89 L. Ed. 1608. Against this principle must be placed the right of a Defendant facing criminal penalties to trial in accordance with the constitutional principles to which we have already referred. South Carolina does not have jurisdiction because the trial of the criminal case in South Carolina amounted to an adjudication of the support case. South Carolina's jurisdiction could only be based on the assumption that the wife was justified in leaving Georgia, the marital domicile of these parties when she broke up the marriage.

The issue which was submitted to the jury in Kershaw County was one which should properly have been considered by a Georgia jury.

The decision of the Judge in Kershaw County to allow the trial there to proceed amounted to a determination that

the Petitioner had been guilty of misconduct in Georga. That determination was made on the warrant and indictment alone. That such a determination was made in advance of the trial is shown by the Supreme Court of South Carolina's finding:

> "The Appellant first breached his duty to contribute to the support of his wife and child in Kershaw County, and we think he was properly indicted in said County for this omission."

If the indictment was proper, then the Petitioner was already adjudged guilty. That judicial decision had only to be affirmed by the jury to subject the Petitioner to criminal penalties.

Under the Georgia law, a minor may acquire a domicile apart from the father if he has "voluntarily relinquished his parental authority". *Yarborough v. Yarborough*, 290 U. S. 202, 78 L. Ed. 172, 54 S. Ct. 181, 90 A. L. R. 924. And as this Court remarked in the *Yarborough case*:

> "The character and extent of the father's obligation and the status of the minor, are determined ordinarily not by the place of the minor's residence but by the law of the father's domicile."

This view of the law is not out of accord with the law in South Carolina. In *State v. Hellams*, 209 S. C. 141, 39 S. E. (2d) 212, the South Carolina Court said:

> ". . . The established law in this State is that where a husband is providing a home, and the necessaries of life therein for his wife and minor, unmarried children, and the wife without just cause or excuse leaves that home and takes such minor children with her, and without just cause or excuse refused the husband the custody of the children, then the duty no longer devolves upon him to support either."

It is our view that jurisdiction in this case would be only in the State of Georgia. That State has a statute simi-

lar to the South Carolina Statute (Ga. Code Ann. Supp., No. 74-9902). In *Weltzbarger v. State,* 89 Ga. App. 765, 81 S. E. (2d) 301, the Georgia Court said in a similar case:

> ". . . Since the original abandonment in the case at bar occurred—insofar as can be concluded from the record here—in Florida in 1949, the venue of the offense, it being continuing in nature, is in the State of Florida, rather than in the State of Georgia. Since there was, after 1949, no resumption of parental rights or duties (there were contributions of the $120.00 about three years prior to this action not being sufficient in law to constitute a return to the discharge of parental duties), the abandonment has been continuous since the 1949 separation, and the venue of this offense lies in Florida rather than in Georgia. . . ."

This rule is not out of accord with the South Carolina rule, as set out in *State v. Nesmith,* 185 S. C. 341, 194 S. E. 160. In that case a defendant sought to avoid prosecution in South Carolina on the grounds that the offense took place in North Carolina, the state to which the wife and child had gone. But South Carolina rejected that contention and said that jurisdiction properly lay in Florence County . . . "for it was in that county, according to this evidence, he first breached his duty to contribute to their support."

Further in that case, the South Carolina Court said:

> "Any contention that, as the wife and child at that time were in Hamlet, N. C., the defendant should have been tried there, cannot be sustained. The offense was a violation of the laws of this State, not of the laws of North Carolina."

Thus it seems clear that this petitioner has been denied the right to be tried in the state in which the crime (if any) was committed—and that state was Georgia.

The duty to furnish support is not the only parental obligation prior to a divorce, alimony or custody proceed-

ing, for the duty of parental care and control devolves upon every parent.

But this father, whose child came into being after the mother had left Georgia, has never had his rights as to custody and control of the child adjudicated. It is true that the Courts generally favor custody in the mother, but the father should not be tried for non-support in a County in which he has never resided prior to any adjudication as to custody.

But some will say: should not this child receive support regardless of whether the father was at fault?

Perhaps the rule cited by the Minnesota Court in *State v. Washneshy*, 246 N. W. 366, is the proper rule:

> "The children are not responsible for the unfortunate differences which have caused the estrangement and separation of the parents and ought not to suffer therefrom. Their rights do not depend upon the degree of culpability of one or the other parent, and their needs must be provided for whether the existing conditions have been brought about by the fault of the one or the other or of both parents."

As the South Carolina Court said in *Koon v. Koon*, 203 S. C. 556, 28 S. E. (2d) 89:

> ". . . The primary consideration for the guidance of the Court is what is best for the child itself."

But these principles do not mean that the wife seeking support can shop for her forum; jurisdiction must be proper before a Court can act—regardless of the needs of a child or its mother.

There is a vast difference in the matter of jurisdiction **on the civil side** for a divorce and jurisdiction **on the criminal side** in an action for non-support.

The rules as to jurisdiction in divorce actions are governed by the statutes of the various States, and this Court

has said that each State must recognize divorces based on the jurisdictional requirements of another State.

But this non-support action is on the criminal side; it is in a sense auxiliary or ancillary to an action for custody and support on the civil side. Since the law gives the wife two legal barrels with which to shoot, it is our view that the criminal barrel should be fired only in accord with proper jurisdictional requirements.

This case presents a conflict of authorities as to jurisdiction in a non-support action. Petitioner had the right to rely on the Georgia law, and he cannot be hailed into South Carolina to answer for a purported omission which began and continued in Georgia.

It is not a legal sophistry or a judicial syllogism which we seek. This Petition is made because the Petitioner manifestly cannot obtain the justice which our Courts should give from a trial in the Court of his wife's choosing. A prophet may be without honor in his own land, but local citizens will invariably honor the native daughter who seeks support from an outlander who has purportedly done her wrong.

CONCLUSION

For the foregoing reasons; this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. T. GRAYDON,
AUGUSTUS T. GRAYDON,
Columbia, S. C.,
JOHN K. DeLOACH,
Camden, S. C.,
Attorneys for Petitioner.

September 9, 1959.